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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARYLAND AND VIRGINIA MILK PRODUCERS COOPERATIVE ASSOCIATION, INC.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF OF AMICUS CURIAE NATIONAL MILK PRODUCERS FEDERATION IN SUPPORT OF PETITION

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BRIEF OF AMICUS CURIAE NATIONAL MILK PRODUCERS FEDERATION IN SUPPORT OF PETITION

INTEREST OF NATIONAL MILK PRODUCERS FEDERATION.

The National Milk Producers Federation (the "Federation") is an association whose membership consists of nearly all the hundreds of milk marketing cooperatives which serve this nation's requirements for milk and dairy products. The Federation's members market a substantial portion of all milk produced in the United States. Thus, the Federation speaks authoritatively for dairy cooperatives and dairy farmers throughout the nation regarding legal and economic issues which affect the production and marketing of milk.

The Federation's basic mission is to protect, preserve and improve the economic well-being of dairy farmers, and thereby insure that the nation's consumers continuously enjoy an adequate supply of pure, wholesome milk. The Federation's members from across the country establish the Federation's policies and positions, so those policies and positions are truly those of American milk producers from every section of the United States. While the Federation and its members support government actions in the public interest, they vigorously oppose unconstitutional, unlawful or oppressive federal actions which place an unfair, unreasonable burden on individual milk producers or their cooperatives, or which operate unnecessarily and inordinately to increase the costs of production and marketing of milk.

The Federation's interest in this case is to implore this Court—on behalf of milk producers throughout

the United States—to review the Fourth Circuit's erroneous decision herein because it not only does violence to the constitutional rights and economic well-being of the dairy cooperative directly involved, it also threatens to do serious, irrevocable harm to the constitutional rights and economic well-being of dairy cooperatives and dairy farmers across the nation. Sadly, the unconstitutional prosecution tactics and procedures imposed on the dairy cooperative in this particular case are *not* unique. In line with the trend deplored by the Washington Post in its recent series of six articles entitled "The Appearance of Justice", they are rapidly becoming part and parcel of the Department of Justice's standard methodology in Sherman Act criminal antitrust prosecutions against dairy cooperatives and thousands of milk producers in this country.[1]

Indeed, as this case comes before this Court for consideration, the government is commencing a series of brand new milk industry criminal antitrust investigations before grand juries in the south, southwest and midwest which—if the Fourth Circuit's decision is allowed to stand without review—promise to inflict further devastating unconstitutional injury and crushing economic loss on dairy cooperatives and their individual farmer members.

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[1] The series of articles entitled "The Appearance of Justice" appeared in the Washington Post during the period from January 10 to January 15, 1993. Those articles question the constitutionality and fairness of aggressive prosecution tactics which regularly include the failure of prosecutors to disclose evidence in their possession that is essential to the defense of criminal charges, and the tendency of prosecutors to manipulate grand juries by failing to apprise them of evidence favorable to the accused.

Accordingly, the Federation prays the Court will grant certiorari in this case, and that upon review, it will revitalize the mandates of the Fifth, Sixth and Eighth Amendments in stale, antiquated vicarious liability criminal antitrust prosecutions under the Sherman Act against dairy cooperatives.

Petitioner and respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Federation respectfully submits that the Fourth Circuit's decision is clearly erroneous and thus this Court should grant the petition for certiorari and, in the alternative, either (a) summarily reverse under Rule 16.1 of this Court's Rules, or (b) schedule the case for further briefing and argument.

1. *Statute of Limitations*—The government failed to prove beyond a reasonable doubt that the prosecution was *not* barred by the five-year statute of limitations, and the district court failed to charge the jury that the government had this burden of proof. Accordingly, the lower courts clearly erred by failing to dismiss the indictment, as a matter of law, under this Court's controlling decision in *Grunewald v. United States*, 353 U.S. 391, 396-97, 413-415 (1957). "Criminal statutes of limitation are to be liberally interpreted in favor of repose." *United States v. Marion*, 404 U.S. 307, 323 n.14 (1971). In this case, the Fourth Circuit *extended* the period of limitations on the basis of an asserted "*reasonable inference*" for which there is no foundation whatsoever in the record. (See Pet.App. 26a).

2. *Unconstitutional Preindictment Delay*—This case is a typical example of unconstitutional preindictment

delay. Petitioner cooperative proved that it was severely prejudiced by the government's extraordinarily lengthy delay of more than seven years. *Dickey v. Florida*, 398 U.S. 30 (1970); *Howell v. Barker*,904 F.2d 889 (4th Cir. 1990), *cert. denied* 111 S. Ct. 590 (1990). The government offered no evidence in the record to explain the extraordinary delay. At the appellate level, it attempted to argue that the delay was "investigative delay" but evidence in the record demonstrates the fallaciousness of that claim. In truth and in fact, the government did absolutely nothing to investigate the alleged Sherman Act violation from April 1984 to July 1986 and from January 1988 to 1991 when it finally indicted the cooperative. Under these circumstances, the indictment must be dismissed for unconstitutional preindictment delay. *United States v. Sample*, 565 F.Supp. 1166, 1183-84 (E.D. Va. 1983); *United States v. Richburg*, 478 F.Supp. 535, 539-46 (M.D. Tenn. 1979).

3. *Prosecutors' Suppression of Impeachment Evidence*—Having delayed the indictment for more than seven years in a vicarious liability criminal case, the prosecutors clearly had a "special duty" to disclose any impeachment or credibility evidence they had regarding their key witness (the disgruntled, hostile, former employee). *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Agurs*, 427 U.S. 97, 107 (1976); *United States v. Bagley*, 473 U.S. 667, 675 (1985). The prosecutors failed to do so. Thus, *throughout the trial*, they suppressed (1) evidence that the former employee had a personal stake in the outcome of the prosecution, and (2) statements the former employee made during 90 hours of intense interrogation in 1991 shortly before the stale indictment was filed

after so many years of delay (See Pet.App. 65a). Suppression of critical evidence, in violation of a defendant's constitutional rights, requires summary reversal. *United States v. Tincher*, 907 F.2d 600 (6th Cir. 1990); *United States v. Beasley*, 576 F.2d 626 (5th Cir. 1978), *cert. denied* 440 U.S. 947 (1978).

4. *The Hyper-Technical Mail Fraud Counts*—These two counts of the indictment should have been dismissed both on the merits and under this Court's controlling decision in *McNally v. United States*, 483 U.S. 350 (1987).

5. *The Excessive, Unconstitutional Fine*—Under the facts and circumstances of this case, the $1,100,000 fine imposed on the cooperative was patently excessive and violative of both the Eighth Amendment, and the factors specified by Congress in the Criminal Fines Enforcement Act, 18 U.S.C. § 3622. The sentencing procedure itself also violated the Fifth Amendment.

ARGUMENT

I

IN A VICARIOUS LIABILITY CRIMINAL CASE OF THIS NATURE AGAINST A DAIRY COOPERATIVE, THE INDICTMENT BASED ON AN ALLEGED STALE VIOLATION OF THE SHERMAN ACT BY AN INACCESSIBLE FORMER EMPLOYEE SHOULD BE DISMISSED BY FAIR APPLICATION OF EITHER THE STATUTE OF LIMITATIONS OR THE DOCTRINE OF UNCONSTITUTIONAL PREINDICTMENT DELAY.

A. THE STATUTE OF LIMITATIONS

In this case, the dairy cooperative was indicted on July 30, 1991 for an alleged violation of the Sherman

Act in the Spring of 1984 by a former employee the cooperative removed from his position in May, 1986 and discharged. The indictment was thus filed more than seven years after the alleged Sherman Act violation, and more than five years after the employee was separated from his position of employment by the cooperative and thus withdrew from the alleged Sherman Act violation.

This case is governed by the five-year statute of limitations prescribed by 18 U.S.C. § 3282, and the government failed to prove beyond a reasonable doubt that the prosecution was *not* barred by that period of limitations. The district court, in turn, failed to charge the jury that the government had the burden of proof on the issue of limitations. Under such circumstances, the Federation believes the lower courts clearly erred by failing to dismiss the indictment, as a matter of law, under this Court's controlling decision in *Grunewald v. United States*, 353 U.S. 391, 396-97, 413-15 (1957).

This Court has ruled that "criminal statutes of limitation are to be liberally interpreted in favor of repose". *United States v. Marion*, 404 U.S. 307, 323 n.14 (1971); *United States v. Scharton*, 285 U.S. 518 (1932). In this case, however, the lower courts clearly failed liberally to interpret the five-year statute of limitations in favor of repose. Instead, they erroneously *extended* the period of limitations on the basis of an asserted '*reasonable inference*' for which there is no basis whatsoever in the record(See *Pet.App.* 26a). In fact, as the petition for certiorari emphasizes, even before the cooperative's former employee *withdrew* from the alleged conspiracy when he was removed from his position in May, 1986, *two* of the other *four*

alleged conspirators (Pet and its Virginia manager) had already *totally withdrawn* in 1985. The record further establishes without contradiction that after May, 1986 the cooperative's replacement employee absolutely refused to become involved in the alleged Sherman Act violation.

Consequently, the Federation urges this Court to recognize from the very outset that the terrible injustice inflicted on the dairy cooperative in this case—as well as the several constitutional issues thereby presented—could and should have been avoided by correct, liberal application of the statute of limitations and this Court's decision in *Grunewald*.

Thus, the Federation submits the lower court's rulings in this regard are so clearly erroneous and the correct result so obvious, this Court should summarily reverse the Fourth Circuit's decision and dismiss the indictment under the statute of limitations. *Rule 16.1, Supreme Court Rules*; *Commissioner of Internal Revenue v. Asphalt Prods. Co.*, 482 U.S. 117, 123 (1987); *Colorado v. Connelly*, 474 U.S. 1050 (1986). In the alternative, the Federation submits the petition for certiorari should be summarily granted, the Fourth Circuit's decision vacated, and the case remanded for reconsideration in light of *Grunewald*, *Marion* and *Scharton*, *supra*. See *Lee v. Missouri*, 439 U.S. 461 (1979).

At the very least, the petition for certiorari should be granted and this case reviewed by this Court on the statute of limitations issue.

B. THE DOCTRINE OF UNCONSTITUTIONAL PREINDICTMENT DELAY.

The Federation joins petitioner in its insistence that this case is a typical example of unconstitutional preindictment delay.

The dairy cooperative was vicariously indicted in 1991 for a crime allegedly committed, without the cooperative's knowledge,authorization or approval, in 1984 by a then new employee it subsequently discharged for other reasons in 1986. The employee left in 1986 with all his personal work papers, bid documents, bid computations, correspondence and memoranda, and from that point forward he was both totally inaccessible to the cooperative and actively engaged in working with the prosecutors to get even with the cooperative for his discharge (*Pet.App.* 63a-65a). Accordingly, when the indictment was filed in 1991, the cooperative was essentially defenseless. Its ability to defend against a Sherman Act violation allegedly secretly committed by the hostile former employee in 1984 was nearly nonexistent.

The prosecutors then added insult to injury by unfairly manipulating the hostile employee and successfully opposing every effort the cooperative made to interview or depose him, or learn something about the alleged Sherman Act violation for which it was vicariously indicted.

The Federation submits, therefore, that the record fully supports the cooperative's contention that it was *severely prejudiced by the government's extraordinarily lengthy preindictment delay*. Its ability to defend itself in this vicarious liability case was destroyed, and it was effectively prevented from determining

whether farmer cooperative exemptions from the antitrust laws under the Capper-Volstead Act, 7 U.S.C. § 291, the Clayton Act, § 6, 15 U.S.C. 17, or the Virginia Antitrust Act, Code of Virginia, § 59.1-9.4(2), precluded its vicarious antitrust liability in this case. See *Dickey v. Florida*, 398 U.S. 30 (1970) (prejudice consisted of loss of key witnesses and documents); *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990), *cert. denied* 111 S. Ct. 590 (1990) (prejudice involved loss of an alibi witness); *United States v. Richburg*, 478 F.Supp. 535, 539-546 (M.D. Tenn. 1979) (prejudice resulted from lost, discarded notes and important documents); *United States v. Sample*, 565 F.Supp. 1166 (E.D. Va. 1983) (prejudice consisted of the loss of one witness and loss of memory by another witness).

But while petitioner cooperative established that it suffered *fatal prejudice* as a result of the government's extraordinary preindictment delay, *the government offered absolutely no evidence in the record to justify those years of delay*. The district court, in turn, held no evidentiary hearing to determine why the indictment was not filed until 1991. *Consequently, the Fourth Circuit's erroneous preindictment delay holdings in this case are based exclusively on what the government argued in its brief at the appellate level.* As Mr. Justice Stevens wrote in his dissenting opinion in *United States v. Lovasco*, 431 U.S. 783, 799 (1977):

> "Manifestly, [unsworn statements of counsel at the appellate level] cannot be properly considered by us in the disposition of [a] case. . . ."

But, even if the government's arguments on appeal could be considered by this Court as evidence, the

record in this case plainly establishes the obvious fallaciousness of those arguments. The government's main contention was that the lengthy delay of several years was "*investigative delay*" approved by this Court in *United States v. Lovasco*, *supra* (Govt.'s 4th Cir. brief, pp. 13-15). In order to make that baseless argument, the government distorted the true facts in its appellate brief, as follows (at p. 14):

> "First, the earlier [1986-88] investigation centered on allegations of bid rigging on military milk contracts, *not* school contracts . . . Second, that investigation did not involve a participating member of the conspiracy, Pet Dairy. . . ."

But the Department of Justice's letter of August 28, 1991, which contains the limited, misleading *Brady* material divulged by the prosecutors in this case, proves that argument is false (*Pet.App.* 66a). The Department's letter unqualifiedly states that, *during the 1986-1988 investigation*—

> "Charles Elliott [the cooperative's hostile former employee] stated he had no basis to believe there had been collusion on *school bids*." (Italics supplied.)

And, in a closely-related criminal case in the same district court—*United States v. Hughes*, Cr.No. 92-25-N—one of the prosecutors in the 1986-88 investigation testified as a witness for the government as follows (*Pet.App.* 77a):

> "However, from the get go [in 1986] school bids were included and were a focus . . . in [the] bid-rigging investigation. . . ."

Indeed, the indictment in *Hughes* demonstrates that Mr. Hughes was indicted for alleged perjury during the 1986-88 investigation regarding his dairy's (Birtcherd Dairy's) purported collusion with *Pet Dairy* on *school contracts—not* military contracts. Thus, contrary to the government's unsworn arguments on appeal in this case, Pet Dairy was clearly involved in the 1986-88 investigation.

Stripped of the government's inaccurate, self-serving appellate arguments, therefore, the record establishes that this is what actually occurred: In 1986, the cooperative's disgruntled former employee concocted a series of criminal charges against the cooperative and the employee who replaced him after the discharge, brought them to the prosecutors and urged them to indict the cooperative and the replacement employee (*Pet.App.* 63a-65a). The prosecutors conducted a grand jury investigation *involving both military and school contracts* (*Pet.App.* 63a-66a). On January 27, 1988, however, they wrote a memorandum which recommended that the investigation be closed (*Pet.App.* 65a). That memorandum stated (*Pet.App.* 64a-65a):

> "There are several problems with Elliott's proffer. First, Elliott recently was fired from Marva Maid and has a clear axe to grind against both the company and Mr. Neale. More significantly, however, we have been unable to obtain any corroboration of Elliott's allegations of bid-rigging. . .
>
> "In sum, with the exception of Elliott's allegations, we have no proof of bid-rigging or any other antitrust violations. Since we see

> no other avenues of inquiry at this time, we recommend closing the investigation."

Having "*closed the investigation*" in January, 1988, the prosecutors turned their attention to other matters. After more than $3^1/_2$ years of additional unconstitutional preindictment delay, they decided to reopen the case and indict the cooperative on July 30, 1991. As the district court in Virginia stated in *United States v. Sample, supra,* at 565 F.Supp. 1183-84:

> "It is . . . uncontradicted that from April, 1980 through February, 1982, the government conducted no further investigation into the case, and therefore the safe harbor of investigative delay established by *Lovasco* is unavailable to the government for this period of time. . .
>
> "The Court finds, then, that the government's preindictment delay from April, 1980 to December, 1982 was not justified. When balanced against the actual substantial prejudice to defendants caused by the government's delay, the Court finds that defendant's rights to due process have been impaired."

And, as the district court in Tennessee ruled in *United States v. Richburg, supra,* at 478 F.Supp. 545, 546:

> "Placing defendants upon the "back burner" for two years while the government pursued more pressing matters does not constitute an ongoing investigation of those defendants. . .
>
> "Since it does not appear that the delay in indicting movants was either necessary or

> justified for any reason, the court believes that to compel movants who have established actual prejudice to their defense to stand trial at this late date would violate fundamental conceptions of justice and fair play and thereby run afoul of the due process clause of the Fifth Amendment. The court thus will grant the motions to dismiss the indictment. . . ."

Accordingly, for the same reasons as those expressed *supra* with reference to the statute of limitations, the Federation urges this Court to grant the petition for certiorari, vacate the Fourth Circuit's decision and, by one appropriate procedure or another, direct that the indictment be dismissed under Rule 16.1 of the Supreme Court Rules. In the alternative, this issue also should be reviewed by this Court after further briefing and argument.

II

THE PROSECUTORS' SUPPRESSION OF CRITICALLY IMPORTANT IMPEACHMENT AND CREDIBILITY EVIDENCE, WHICH COULD HAVE HAD A PROFOUND IMPACT ON THE OUTCOME OF THIS CASE, VIOLATED THE COOPERATIVE'S RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS.

In the interest of brevity, the Federation defers to and incorporates herein by reference the facts and arguments contained in the petition for certiorari regarding this vitally important constitutional issue. The Federation wishes to add, however, that in its recent critique of the American system of justice, entitled "The Appearance of Justice", the Washington Post repeatedly referred to the growing tendency of fed-

eral prosecutors to withhold and suppress exculpatory, impeachment or credibility evidence which the Fifth Amendment heretofore required them to disclose to defendants upon request. Thus, this is an issue of important national interest which this Court should clarify in this case.

The Federation submits that in this vicarious liability litigation, the government—which (a) subjected the cooperative to extraordinarily lengthy, exceedingly prejudicial preindictment delay, (b) withheld the discharged employee from any appearance before the grand jury which indicted the cooperative, and (c) bitterly opposed each and every action the cooperative took to interview or depose the otherwise inaccessible employee prior to trial—had a *special duty* to disclose whatever *impeachment* or *credibility* evidence it held regarding the employee for whose stale, antiquated crime the cooperative was finally indicted. See *United States v. Agurs*, 427 U.S. 97, 107 (1976). The prosecutors were particularly obliged to disclose that the former employee had a personal interest in the outcome of this case—that shortly after his discharge, he approached the prosecutors and sought the cooperative's indictment on a series of criminal antitrust charges he personally concocted. See *Giglio v. United States*, 405 U.S. 150 (1972). And, when the prosecutors subjected the employee to more than 90 hours of intensive interrogation just before they finally indicted the cooperative in 1991, they had a special duty to disclose what statements the employee made to cause the prosecutors to decide to indict. *United States v. Bagley*, 473 U.S. 667, 675 (1985).

But, the prosecutors literally disclosed nothing. They withheld part of the critical *impeachment* or

credibility evidence until *after* the cooperative was convicted and sentenced (*Pet.App.* 63a-65a). The remainder they continue to suppress in this case, while they heretofore voluntarily produced it in a related case wherein another defendant was acquitted (*United States v. Hughes, supra*).

Under these compelling circumstances, the lower courts' failure to follow controlling decisions of this Court in *Brady, Agurs, Giglio* and *Bagley* also merits summary reversal under Rule 16.1. Other courts in the federal system have ruled that deliberate suppression of critical evidence, in violation of a defendant's constitutional rights, requires summary reversal. See *United States v. Tincher*, 907 F.2d 600 (6th Cir. 1990); *United States v. Knowles*, 594 F.2d 753 (9th Cir. 1979); *United States v. Beasley*, 576 F.2d 626 (5th Cir. 1978), *cert. denied* 440 U.S. 947 (1978). Again, however, at the very least, the petition for certiorari should be granted and this case reviewed after briefing and argument.

III

THE HYPER-TECHNICAL MAIL FRAUD COUNTS SHOULD BE DISMISSED UNDER THIS COURT'S DECISION IN McNALLY V. UNITED STATES

The Federation also defers to the petition for certiorari with reference to this issue, but with two brief comments. In this case, the cooperative was indicted for allegedly violating the Mail Fraud Statute, 18 U.S.C. § 1341, by simply receiving in the mail two checks from the City of Newport News in payment for milk sold and delivered in the regular course of business. The checks were mailed in September, 1986 and March, 1987—long after the employee in this case

was removed from his position of employment with the cooperative. There is absolutely no proof the cooperative continued to violate the Sherman Act after he was removed. On the basis of this record, the two mail fraud counts clearly should have been dismissed on the merits by the courts below.

In addition, however, there is no evidence in the record to prove that Newport News suffered any economic harm in this case, or that either the cooperative or the former employee intended to cause such economic harm. In fact, at the trial, the discharged employee insisted he never intended to defraud Newport News or to subject the city or its schools to any such harm (JA 421).

Here, too, therefore, the Federation urges this Court to grant the petition for certiorari and reverse the Fourth Circuit's decision on the ground it fails to follow this Court's controlling decision in *McNally v. United States*, 483 U.S. 350 (1987). In *McNally*, Mr. Justice White, writing for the Court, stated, at 483 U.S. 350, 360:

> "As the Court said in a mail fraud case many years ago: 'There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926). Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights."

As the petition for certiorari demonstrates, Congress thereafter enacted 18 U.S.C, § 1346 in 1988. But, this case was concededly governed by *McNally*; and under *McNally*, the two mail fraud counts should have been dismissed. Here, too, summary resolution under Rule 16.1 seems appropriate. Otherwise the petition should be granted and the case scheduled for further argument.

IV

THE FINE IMPOSED ON THE COOPERATIVE AND ITS INNOCENT FARMER MEMBERS WAS VIOLATIVE OF THE FIFTH AND EIGHTH AMENDMENTS, THE CRIMINAL FINES ENFORCEMENT ACT, AND IT WAS AN ABUSE OF DISCRETION BY THE DISTRICT COURT.

Excessive fines are prohibited by both the Eighth Amendment and the Criminal Fines Enforcement Act, 18 U.S.C. § 3622. Sentencing procedures must also comport with due process requirements of the Fifth Amendment. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Fines are thus reviewable on both constitutional grounds,and for a court's abuse of discretion under 18 U.S.C. § 3622. *United States v. Harvey*, 885 F.2d 181 (4th Cir. 1989).

In this case, the cooperative was fined $1,100,000 for its former employee's violations of the Sherman Act and the Mail Fraud Statute, 18 U.S.C. §1341. The cooperative had no previous conviction for the violation of any criminal statute, and in the final analysis, the excessive fine imposed on the cooperative will have to be paid by its innocent farmer members, many of whom were not even members of the co-

operative when the employee allegedly violated the Sherman Act.

In addition to the $1,100,000 fine, the cooperative, upon conviction, was automatically suspended as a defense contractor. It thereby lost approximately $10,000,000 in federal military milk sales. It was then sued for treble damages in a civil antitrust action filed by the Commonwealth of Virginia. In that suit, the cooperative and its farmer members were required to pay another $1,050,000 to Virginia schools irrespective of the fact Virginia schools always profited significantly on milk purchased from the cooperative. These staggering losses were imposed although the record in this case establishes the employee's alleged Sherman Act violation did *not* result, and it was *not* intended to result, in either *increased prices* for the Virginia schools or *increased profits* for the cooperative. This, of course, is bizarre, because as the Ninth Circuit stated in another vicarious liability case, *United States v. Hilton Hotels Corporation*, 467 F.2d 1000, 1006, (9th Cir. 1972), *cert. denied* 409 U.S. 1125: "Sherman Act violations are commercial offenses. They are usually motivated by a desire to enhance profits."

This Court has recognized, in a different context, that farmers normally occupy "a particularly harsh economic position". *National Broiler Marketing Association v. United States*, 436 U.S. 816, 825 (1978). "They are subject to the vagaries of market conditions that plague agriculture generally, and they [have] no means individually of responding to those conditions." *National Broiler*, at 825. "Farmers . . . [are] caught in the hands of processors and distributors who, because of their position in the market and their

relative economic strength, [are] able to take from the farmer a good share of whatever profits might be available from agricultural production." *National Broiler*, at 825. This Court's findings in *National Broiler* are appropriate here to demonstrate quite clearly that the excessive, oppressive fine and penalties imposed on the cooperative in this case, but which have to paid by its individual farmer members, will have a devastating impact on those individual farmers.

In this regard, too, the Federation urges this Court to grant the petition for certiorari and remedy the excessive fine imposed on the cooperative and its members. In this case, the lower courts obviously acted without any reference to or consideration of the other crushing penalties that would automatically follow.

Respectfully Submitted:

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